exceptional cases in which the ordinary legal remedies are inadequate. It would issue within the court's discretion as of course to a person aggrieved but where the applicant is a stranger the court's discretion will only be exercised in exceptional circumstances. As was stated in *R.* v. *Surrey Justices* [7] (*per* Blackburn J.) :—

"I entirely concur in the proposition that, although the court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiae*, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiae* if he suffers from the usurpation of jurisdiction by another court."

This rule again is subject to qualification, *a fortiori* a stranger, that even though the writ issues *ex debito justitiae* where the applicant is a person aggrieved the court does not lose its discretion to refuse the order where the conduct of the applicant disentitles him to such relief. Sir Wilfred Greene M.R. in *R.* v. *Stafford Justices* [8] at page 43 stated thus:—

"Now, in my opinion, the order for the issue of the writ of *certiorari* is, except in cases where it goes as of course, strictly in all cases a matter of discretion. It is perfectly true to say that if no special circumstances exist, and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled *ex debito justitiae* to his order. That merely means this, in my judgment that the court in such circumstances, will exercise its discretion by granting the relief. In all discretionary remedies it is well known and settled that in certain circumstances — I will not say in all of them, but in a great many of them — the court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way, and if a judge at a trial refuses to do so, then the Court of Appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the court is entitled to inquire into the conduct of the applicant, and the circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must in my judgment be one of discretion."

The conduct of the objector is, therefore, relevant and conduct in this case is to be ascertained from surrounding circumstances. The dispute between the objector and the council has hitherto been unrelated to breaches of the bye-laws which became the ground for the petition. Significantly the letter of 25th April 1964 which contains the final demands of the objector again has nothing to do with the breaches of the bye-laws. This letter shows inconsistency and any merit in the objector's claim up to that time has been soured by parsimony and bad faith on the objector's part in trying to seek material advantage. Such tainted objectives must surely reflect on the conduct of the objector. In my view, therefore, the application lacks merit and the conduct of the petitioner is such that he does not deserve the discretionary remedy sought.

I would, therefore, allow the appeal with costs.

Appeal allowed.

Solicitors: *Lim Ewe Hock; Sharma & Co.*

OOI HEE KOI v. PUBLIC PROSECUTOR
OOI WAN YUI v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L — Federal Court Criminal Appeals Nos. X. 9 and X. 12 of 1966]

Internal Security — Consorting with armed Indonesians — Possession of firearm and ammunition — Claim to be "prisoners of war" — Geneva Conventions Act, 1962, 3rd Schedule, art. 4 — Internal Security Act, 1960, ss. 57 and 58.

National Registration — Identity card — Description of holder as "citizen of the Federation of Malaya" — Whether proof of status — National Registration Act, 1959, s. 5 — National Registration Regulations, 1960, regs. 5(2)(a) & 23(1).

Geneva Conventions Act, 1962 — Prisoners of war — Entitlement to benefit of conventions.

Judicial Precedent — Whether Federal Court bound by its own decisions — Life and liberty at stake — Relevant consideration.

OHK, the appellant in the first appeal, was convicted on charges of possession of a firearm, possession of ammunition and consorting with members of Indonesian armed forces in contravention of sections 57(1)(a), (b) and 58(1) of the Internal Security Act, 1960. He pleaded guilty to the third charge, but claimed trial on the other charges. *OWY*, the other appellant, had claimed trial on three similar charges, with the same result.

The material evidence in both cases was very much the same. They were members of an armed force of paratroopers who were air-dropped over Labis area in Johore in the early hours of September 2, 1964. On the person of *OHK* was found his identity card, No. 3019104 which indicated that his place of birth was "China" and that he was "a citizen of the Federation of Malaya". *OHK* in his statement to a police officer said, *inter alia*, that he had come over from China with his parents at the age of 2 to reside in Pontian, Johore. *OWY* was not in possession of any identity card and no evidence was given as to the kind of card issued to him under the National Registration Act, 1959. In his cautioned statement *OWY* said *inter alia* that he was born in China and that in 1948 when he was 12 his father brought him to Malaya.

It was contended for the appellants that they were and should be treated as "prisoners of war" as defined in article 4 of the Third Schedule to the Geneva Conventions Act, 1962, and as such they should be entitled to all the benefits of the relevant Conventions.

Held: (1) the question of *OHK's* allegiance could not be resolved by the mere production of his identity card (which stated that he was born in China and that he was a citizen of the Federation of Malaya) because unlike a passport an identity card does not confer rights but imposes obligations. Proof of the truth of the allegation as to this appellant's status rested on the prosecution. The prosecution offered no such proof, notwithstanding that both in the identity card and the cautioned statement, the appellant's place of birth was evident. This appellant was therefore a prisoner of

war and was entitled to the benefit of the Geneva Conventions;

(2) in the case of *OWY*, the prosecution had failed to prove that he was a person owing allegiance at any relevant time to His Majesty the Yang di-Pertuan Agong; consequently he should have been held to be a prisoner of war and was also entitled to the benefit of the Geneva Conventions;

(3) in criminal matters where life and liberty are at stake the court will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before it in the earlier case.

Cases referred to:—

(1) *Lee Hoo Boon* v. *Public Prosecutor, ante* p. 167, F.C. dissented from.

(2) *Joyce* v. *Director of Public Prosecutions* [1946] A.C. 347, 368, 369.

(3) *R.* v. *Burdett* (1820), 4 B. & Ald. 95, 140.

(4) *Attygalle* v. *R.* [1936] 2 All E.R. 116.

(5) *Seneviratne* v. *R.* [1936] 3 All E.R. 36.

(6) *Willcock* v. *Muckle* [1951] 2 K.B. 944, 851.

(7) *Gideon Nkambule* v. *R.* [1950] A.C. 379.

FEDERAL COURT.

M. Abraham for the appellant in X. 9 of 1966.

K. C. Yap for the appellant in X. 12 of 1966.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: These appeals came up for hearing in consecutive order on May 9, 1966, but since they raised a common ground on which the decision must turn, we think it will be convenient to deal with them in a single judgment. It was contended that the appellants were and should be treated as "prisoners of war" within the definition in article 4 of the Third Schedule to the Geneva Conventions Act, 1962; as such they should be entitled to all the benefits of the relevant Convention.

Ooi Hee Koi, the appellant in the first appeal had been prosecuted on three charges, of possession of a firearm, possession of ammunition and consorting with members of Indonesian armed forces, in contravention of sections 57(1)(a), 57(1)(b) and 58(1) of the Internal Security Act, 1960. He pleaded guilty to the third charge, which carries an alternative of life imprisonment to the death sentence, but claimed trial on the other charges. In the result he was convicted on all three charges and sentenced to death on each charge.

Ooi Wan Yui, the other appellant, had claimed trial on three similar charges, with the same result.

Each of them now appeals against his conviction and sentence.

Except as to the circumstances of their capture, the material evidence in both cases was very much the same. They were members of an armed force of 47 paratroopers, under the command of Lieutenant Sutikno of the Indonesian air force, who in the early hours of September 2, 1964, were air-dropped from a Hercules plane belonging to the Indonesian air force over the Labis area of Johore. All 48 members of this invasion force were in camouflage uniform of that air force and each carried a firearm, ammunition, two hand-grenades, food rations and other military equipment. The force was divided into 8 sections, each under a section commander, with Lieutenant Sutikno as overall commander. Of the 48 men 34 were Indonesians and 14 so-called Malayan Chinese. Among the latter were these appellants.

On the person of Ooi Hee Koi, when he was captured, was found his identity card, No. 3019104, which was produced in evidence by the prosecution. Ooi Wan Yui was not in possession of any such card and no evidence was given as to the kind of card issued to him under the National Registration Act, 1959.

Each made a cautioned statement to a police officer, shortly after being taken prisoner, which the learned trial judge held admissible in evidence. Ooi Hee Koi, in his statement, said that he was 26 years old and had come over from China with his parents, when he was 2, to reside in Pontian, Johore. At the age of 12 to 14 he went to the Bin Cheng Chinese School, and while still a boy, he became a rubber tapper after the death of his father. In 1955 he became a courier for communist-terrorists and on February 29, 1959 he was arrested for subversive activities and detained for a total period of six months in Johore Bharu, Kuala Lumpur and Johore. Upon his release he was placed under an order of restricted residence. During a spell of unemployment in April 1964 one Beh Yong offered to find him work in Indonesia. He was taken to an island off Singapore where he was compelled to undergo military training by Indonesians, followed by further training in Bandoeng. The rest of his statement told how he was brought over to Johore and eventually captured.

Ooi Wan Yui, who was 29, in his statement, said that he was born in the Lam Hua district of Fukien, China, where he lived with his mother until the age of 12. In 1948 his father fetched him and his mother to Malaya, where the family settled down in Trong. In brief, the rest of his story told how he left for Indonesia at the end of May 1964, underwent military training there, was parachuted into Johore on September 2, 1964 and was in the company of another Chinese, Lee Hoo Boon (the appellant in *Lee Hoo Boon* v. *Public Prosecutor* [1]) and an Indonesian soldier

when the three of them came under fire from the security forces, the Indonesian was killed and he and Lee Hoo Boon were captured.

Before closing his submissions, Mr. Abraham, counsel for Ooi Hee Koi, intimated that he would ask leave to add a further ground of appeal, arising out of the fact that this appellant was born in China. He was told that he would be heard further, should the court deemed it necessary after hearing argument by Mr. K. C. Yap, counsel for Ooi Wan Yui, on the same ground. After hearing Mr. Yap and the learned Deputy Public Prosecutor judgment on both appeals was reserved.

While these appeals were under consideration the winds of change have happily blown away the miasma of Indonesian confrontation. The military and political solution however, is not the end of the matter, unfortunately, so far as cases pending in the courts are concerned.

The appellants' claim to be prisoners of war makes it necessary to refer to the definition of that term in article 4 of the Third Schedule to the Geneva Conventions Act, 1962, the relevant portion of which reads:

"Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."

This category includes members of volunteer corps forming part of the armed forces of a party to the conflict and the evidence for the prosecution leaves no room for doubt that the appellants were in fact members of the Indonesian armed forces commanded by Lieutenant Sutikno, whether volunteers or conscripts. That being the case, the appellants ought *prima facie* to be regarded as prisoners of war unless there were circumstances which disentitled them to treatment as such.

Dealing, for a start, with the case of Ooi Wan Yui, two arguments were advanced by Mr. K. C. Yap. In the first place, he refers to the definition of "Indonesian" in the Internal Security (Controlled Area) Order, 1964 (L.N. 244/64) which under paragraph 2(c), includes:—

"any person who, having been ordinarily resident in the Federation of Malaya, North Borneo, Sarawak or Singapore on or after the 8th day of December, 1962, left the Federation of Malaya, North Borneo, Sarawak or Singapore, as the case may be, on or after that date, or who, having been ordinarily resident in Malaysia on or after Malaysia Day, left Malaysia on or after that that day, without complying with the appropriate laws relating to national registration, passports, immigration or aliens."

This order, however, was made for a specific and limited purpose, namely, to prohibit the entry of Indonesians as so defined, into a "Controlled Area", declared to mean the "territorial waters bordering the States of Malaya and Singapore." Section 20 of the Interpretation and General Clauses Ordinance provides that "When an Ordinance or Enactment confers powers to make any subsidiary legislation, expressions used in the subsidiary legislation shall, *unless the contrary* intention appears, have the same respective meaning as in the Ordinance or Enactment conferring the power." Since the order was expressly made for a limited purpose only, there is clearly a contrary intention that the term "Indonesian" has no application beyond the scope of the order itself.

In the next place, Mr. Yap relies, in support of his contention, on the most recent judgment on this point of the Federal Court (see *Lee Hoo Boon* v. *Public Prosecutor* [1]) in which Thomson L.P. said:

"I now come to the only ground of appeal which has given us some concern.

It was argued that on the evidence the appellant was a member of the Indonesian military forces. He had associated himself with them. He had been trained by them. He formed part of an organised company with them. He was wearing Indonesian uniform. He was carrying Indonesian weapons. Then it was said that the relationship between this country and the Republic of Indonesia if it did not amount to actual war in the conventional Grotian sense amounted to a state of hostilities as envisaged by the Geneva Conventions of 1949 relating to prisoners of war. In the circumstances the appellant was entitled to the benefit of these Conventions to which this country is a party and which have become part of our municipal law by reason of the Geneva Conventions Act, 1962. At the trial he did not claim the protection of the Conventions but we have listened to a long and careful argument to the effect that nonetheless he was entitled to that protection. The grounds on which it has been argued that the appellant was a member of the Indonesian military forces have been stated. There is, however, one other relevant fact and that is that *on the appellant's own admission he was born in the State of Johore. There is no other evidence having any bearing on his national status and from the admitted fact that he was born in the State of Johore then in the absence of anything to the contrary it must be presumed that whatever the position as regards citizenship he is at all material times a Johore national.*

That being so, in our view he is not entitled to the benefit of the Geneva Conventions."

The Lord President then referred to the following passage at page 268 of *Oppenheim's* International Law (7th Ed.):

"The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerant who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, (that is their own armed forces) fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished."

He went on as follows:

"In our view the Geneva Conventions are to be read in the light of that statement which after all is a statement of a principle of international law by a recognised authority and read in that light *the present appellant is not entitled to the protection of the Conventions even if he did become a member of the Indonesian armed forces*

because he was a traitorous subject of the Ruler of the State of Johore and was engaged in assisting the Republic of Indonesia in armed conflict with this country of which Johore is part."

With respect, we do not agree with that judgment. Lee Hoo Boon did not automatically become a citizen of the Federation of Malaya merely by reason of his being born in the State of Johore: see articles 14(1)(a), 16, 18(1) of the Constitution of the Federation of Malaya. Not being "Malay" as defined in the Johore Nationality Enactment, 1952, his birth within the State of Johore did not *per se* clothe him with the status of a national of that State: see sections 2, 4(c) & (f) and (5) of the Enactment. We do not think that any fact may be presumed when the onus of proving such fact lies on the prosecution.

Mr. Yap, of course, was relying on the inverse proposition, that no one but a "traitorous subject" is disentitled to the benefits of the Geneva Conventions. In the case of his client, Ooi Wan Yui, as against uncontroverted evidence that he was born in China, there was not an iota of evidence to prove that he owed allegiance to His Majesty the Yang di-Pertuan Agong. On the other hand, even in the consorting charge itself which was abundantly supported by the evidence, he was said to be a member of the Indonesian armed forces. The onus clearly did not rest on him to prove that he was not a subject of His Majesty or that by reason of his past residence he was owing allegiance at the time he joined the Indonesian armed forces, or during the period specified in the charges against him.

That long residence alone is insufficient to found allegiance is clear from the judgment of Lord Jowitt L.C. in *Joyce* v. *Director of Public Prosecutions* [2]:

"There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brother or sisters as a family. But though there was no continuing protection for his family or effects, of him too it must be asked, whether there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance....Treason, 'trahison,' is the betrayal of a trust: to be faithful to the trust is the counterpart of the duty to protect. It serves to illustrate the principle which I have stated that an open enemy who is an lien, notwithstanding his presence in the realm, is not within the protection nor therefore within the allegiance of the Crown. He does not owe allegiance because although he is within the realm he is not under the sovereign's protection.....The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's enemies..... The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the appellant has not been produced, but its contents have been duly proved.....By its terms it requests and requires in the name of His Majesty all those it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed."

In that case the onus of proof was said to rest on William Joyce to show that something had occurred to put an end to his duty; it was contended by the Attorney-General that "if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast upon the former." On this point Lord Porter in his dissenting judgment quoted Holroyd J. in *R.* v. *Burdett* [3]:

"*The rule in question,* he says, *is not allowed to supply the want of necessary proof, whether direct or presumptive,* against a defendant of the crime with which he is charged; but when such proof has been given it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

Such rule of evidence is enunciated in section 106 of our Evidence Ordinance which provides:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

On this point it is sufficient to say that the Judicial Committee have clearly laid down that this section does not cast any burden on an accused person to prove that no crime was committed by proving facts especially within his own knowledge: see *Attygalle* v. *R.* [4] and *Seneviratne* v. *R.* [5] In the instant case Ooi Wan Yui committed no offence that was not committed by an Indonesian member of the same invasion force and article 16 of the Third Schedule declares that "all prisoners of war shall be treated alike." A distinction to his disadvantage can only arise if at the relevant time he owed a duty of allegiance, which the Indonesians did not. *Joyce's case* clearly shows that onus lies on the prosecution to prove allegiance. Although the instant case is not a trial for treason, the question of allegiance is no less material if it is to deprive this appellant of the status of prisoner of war. Section 105 of the Evidence Ordinance, of course, does not relieve the prosecution of the necessity of proving allegiance, since that fact is not among "any of the general exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence", which of course, is the Internal Security Act, 1960.

We are accordingly of the opinion that, in the case of Ooi Wan Yui, the prosecution had failed to prove that he was a person owing allegiance at any relevant time: Consequently he

should have been held to be a prisoner of war and entitled to the same treatment as was accorded to Lieutenant Sutikno and the Indonesians under his command none of whom were put on trial for any offence under the Internal Security Act, 1960. Moreover and in particular, the trial had failed to comply with the mandatory provisions of articles 87, 100 & 104 of the Third Schedule to Act of 1962. His appeal is therefore allowed and the conviction and sentence quashed.

We turn now to the other appellant, Ooi Hee Koi, in whose possession a blue identity card was found, stating under place of birth "China" and under classification of "race", that he is "Warga Negara Persekutuan", a citizen of the Federation of Malaya. The National Registration Act, 1959, provides in section 5, that "Subject to the provisions of any exemptions which may be granted by regulations made under section 6, every person within the Federation shall be registered under and in accordance with the provisions of this Act and of any regulations made thereunder."

The National Registration Regulations, 1960 (*vide* L.N. 151/60) provide by regulation 5(2)(a) for the issue of "blue bordered cards with blue printing to citizens of the Federation of Malaya." This would seem at first sight, to conclude the matter, but is the question of Ooi Hee Koi's allegiance resolved by the mere production of his identity card?

The prototype of our Act is the English National Registration Act, 1939 (2 & 3 Geo. 6, C. 91). In an appeal heard by a court of seven judges specially constituted for the purpose, Lord Goddard C.J. said in *Willcock* v. *Muckle* [6]:

"This Act was passed for security purposes; it was never passed for the purposes for which it is now apparently being used," (i.e. whenever motorists were stopped or interrogated for any cause).

This case shows, in our opinion, that a distinction should be observed between a passport (held decisive in *Joyce's* case) and an identity card. The former confers rights whereas the latter imposes obligations. The former avails its non-subject holder to claim Crown protection abroad, whereas the latter is of no possible value outside the Federation. What, at all events, is crucial for the purposes of this case is that regulation 23 provides:

"23. (1) *The burden of proving the truth of* the contents of any written application for registration under these Regulations, or *the contents of an identity card, shall be on the* applicant, or on the person to whom such identity card has been issued, or on any other *person alleging the truth of such contents.*

(2) Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him."

Proof of the truth of the allegation as to this appellant's status thus rested on the prosecution. The prosecution offered no such proof, notwithstanding that both in the identity card and the cautioned statement, the appellant's place of birth stood out plain as a pikestaff. This appellant therefore, should stand on the same footing as the other. We accordingly allow his appeal as well and quash the conviction and sentence.

In arriving at this decision we are not unaware that it runs counter to the previous decision of this court. Nevertheless, we do so without qualms. As Sir Carleton Allen says at p. 245 of *Law in the Making* (6th Ed.) "the case of *Gideon Nkambule* v. *R.*[7] makes it clear that in criminal matters at least, where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before the court in the earlier case." We would not hesitate to follow the same principle.

Barakbah L.P. and **Ismail Khan J.** concurred.

Appeal allowed.

Solicitors: *M. Abraham; K. C. Yap & Co.*

STEPHEN KALONG NINGKAN v. TUN ABANG HAJI OPENG and TAWI SLI

[O.C.J. (Harley Ag.C.J. (Borneo)) September 7, 1966]

[Kuching Civil Suit No. K. 45 of 1966]

Constitutional Law — Constitution of the State of Sarawak, Articles 1, 5, 6, 7, 10, 24 and 44 — Whether Governor has power to dismiss Chief Minister — Allegation that Chief Minister has ceased to command the confidence of majority in Council Negri — Lack of confidence may be demonstrated only by vote in Council Negri.

Article 6(3) of the Constitution of the State of Sarawak gives power to the Governor to appoint as Chief Minister a member of the Council Negri who in his judgment is likely to command the confidence of a majority of the members of the Council Negri; while Article 7(1) provides that if the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then unless at his request the Governor dissolves the Council Negri the Chief Minister shall tender the resignation of the members of the Supreme Council.

On the 16th June 1966, the Governor of Sarawak (the first defendant) received a letter signed by 21 members of the Council Negri to the effect that the writers had no longer any confidence in the plaintiff, their Chief Minister. The Governor thereupon wrote and informed the plaintiff on the 16th June that from representations he had received he was satisfied that the plaintiff had ceased to command the confidence of the Council Negri and invited the plaintiff to resign. The plaintiff in his reply of the 17th June informed the Governor that the Governor's views as to the loss of confidence of the members of the Council Negri in the plaintiff was not supported by the meeting of the Council Negri held on the 14th June and the plaintiff in the same letter requested that he be supplied with the names of the persons who had signed the representations. In reply to this letter the Governor in his letter of the